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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CITY OF BERKELEY, Plaintiff and Respondent, v. U-HAUL COMPANY OF CALIFORNIA et al., Defendants and Appellants.	A122694 (Alameda County Super. Ct. No. RG08388586)

This is an appeal from the trial court's decision to grant an application for a preliminary injunction in a public nuisance action. Because a decision from this court in another action involving the same parties and the same underlying issues has rendered the issues raised in this action moot, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGOUND

Respondent City of Berkeley (the City) brought this public nuisance action to enjoin appellants U-Haul Company of California (U-Haul) and Amerco Real Estate Company (collectively, appellants) from operating a truck and trailer rental facility without the required use permit on property located at 2100 San Pablo Avenue (the property). The City revoked U-Haul's use permit on September 18, 2007, based on evidence presented at a public hearing that U-Haul had committed repeated and serious violations of the permit's terms and conditions.[1] The City's public nuisance action was

[1] Under Berkeley Municipal Code section 23B.60.020, the City Council "may revoke . . . the permit" if it finds that either "(A) the holder of the permit has failed to

thus premised on appellants' violation of a zoning ordinance requiring a valid use permit to conduct U-Haul's business on the property.

In August 2008, the trial court granted the City's application for a preliminary injunction, and thereby ordered appellants to "[r]efrain from all truck and/or trailer rental activity at 2100 San Pablo Avenue in Berkeley," and to "[r]efrain from bringing any trucks or trailers to, or accepting them at, 2100 San Pablo Avenue in Berkeley." In issuing the preliminary injunction, the trial court found that the City had demonstrated a reasonable probability of prevailing on the merits with respect to the alleged zoning ordinance violation, and thus that, under *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, a rebuttable presumption had arisen that potential harm to the public outweighed potential harm to the defendant. As such, the trial court found that the burden had shifted to appellants to demonstrate that U-Haul would suffer grave or irreparable harm should the injunction issue, which burden appellants had failed to meet.

Appellants timely appealed the trial court's decision.

DISCUSSION

On appeal, appellants challenge the trial court's decision to grant the City's application for a preliminary injunction on three grounds: (1) the trial court misapplied the legal standard requiring a weighing of the parties' relative harm in deciding whether to issue the preliminary injunction, citing *IT Corp. v. County of Imperial, supra,* 35 Cal.3d 63; (2) the evidence of appellants' injury to business goodwill constituted irreparable harm as a matter of law; and (3) the trial court abdicated judicial responsibility by relying on opinion testimony from a City employee in finding that a zoning ordinance violation had occurred.[2]

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comply with at least one or more of the conditions set forth therein; [or] [¶] (B) the use . . . permitted has been substantially expanded or changed in character beyond that set forth in the permit."

[2] On August 20, 2008, appellants filed a petition for writ of mandate in this court seeking a stay of the preliminary injunction pending this appeal. On August 22, 2008, we denied appellants' petition.

In making this challenge, appellants acknowledge that, in a separate action against the City, they filed a petition for writ of administrative mandamus challenging the City's decision to revoke their use permit on several grounds, including that revocation of the use permit was unwarranted based upon the record as a whole and that U-Haul had a vested constitutional interest in carrying on a lawful business that could not be interfered with absent a compelling public necessity. In that separate action, the trial court denied appellants' petition for writ of administrative mandamus, a decision which appellants thereafter appealed to this court.

On March 27, 2009, this court issued a decision upholding the trial court's denial of U-Haul's petition for writ of administrative mandamus seeking to overturn the City's revocation of its use permit (March 2009 decision). (*U-Haul Company of California v. City of Berkeley*, A121811 (non-published).) In doing so, we concluded revocation of the permit was justified because substantial evidence established appellants' noncompliance with and substantial expansion of the permitted use. (*Ibid*.) Appellants thereafter filed a petition for review with the California Supreme Court, which was denied on June 10, 2009, after briefing in this appeal had concluded.

On July 28, 2009, based on our March 2009 decision and the subsequent denial of appellants' petition for review with the California Supreme Court, we ordered the parties to file supplemental briefs regarding whether this appeal should be dismissed as moot. The parties promptly complied with our order.

Having now considered the parties' supplemental briefing, we conclude this appeal is most certainly moot. The legal principles commanding our conclusion are as follows.

As an appellate court, we sit only to decide live controversies. We do not decide issues that are moot or abstract, or declare legal rules or propositions that cannot effect the rights of the parties. Accordingly, if an event occurs subsequent to the filing of an appeal that makes affording effectual relief to the appellant impossible, we must dismiss the appeal. (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174,

1178-1179; *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3rd 1, 10; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 749.)

These principles apply to matters, like this one, involving preliminary injunctions. "[I]njunctive relief will not be granted where events have rendered such relief unnecessary or ineffectual." (*Paul v. Milk Depots, Inc*. (1964) 62 Cal.2d 129, 133; see also *Finnie v. Town of Tiburon, supra,* 199 Cal.App.3rd at pp. 6-8, 10 [dismissing an appeal as moot where plaintiffs sought to enjoin a special election they claimed was illegal, because the election had gone forward as scheduled after the appeal was filed]; *Bernard* v. *Weaber* (1913) 23 Cal.App. 532, 535 [dismissing an appeal as moot because issuing an injunction to enjoin the defendant from "doing that which he has already done, would be an idle and frivolous act, since such decision would have no binding authority and would not affect the legal rights of the parties"].)

Here, an event occurred after appellants filed this appeal that renders it impossible for us to provide them any effectual relief – to wit, our March 2009 decision, which has become "res judicata" with respect to the issues raised herein. We will explain.

" 'Res judicata' describes the preclusive effect of a final judgment on the merits." (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896.) Specifically, under the res judicata doctrine, "[a] final judgment on the merits between parties who in law are the same operates as a bar to a subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action." (*Olwell v. Hopkins* (1946) 28 Cal.2d 147, 152.) Otherwise stated, " ' "[r]es judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief" ' [Citation.]" (*Mycogen Corp., supra*, 28 Cal.4th at p. 897.)

In this case, applying the principles of res judicata, there is no issue left for us to decide that could afford appellants any relief. Put simply, appellants seek the lifting of an injunction that bars them from conducting their truck and trailer rental business on the property. Appellants' request is based on their claim that the City had no basis for revoking the use permit that authorized them to conduct this business. Indeed, in their

opening brief, appellants describe this action as one "relat[ing] to the City's extraordinary revocation of U-Haul's 1975 Use Permit in a Limited Commercial District based on several technical citations . . . ." Appellants then ask for this court's "assistance to protect U-Haul's invaluable customer goodwill from dissipation and irreparable harm while . . . a separate appeal of the underlying [revocation] issue remains pending in this Court." However, that "separate appeal" is no longer "pending." In our March 2009 decision, we upheld the City's decision to revoke appellants' use permit. While appellants raise some new constitutional arguments in this action in opposing the City's request for a preliminary injunction – including arguments that revoking their use permit violated their rights to equal protection and due process – the principle of res judicata bars relitigation of not only issues that were raised in the prior action, but also issues that could have been raised.[3] (*Olwell v. Hopkins, supra,* 28 Cal.2d at p. 152.)

Under these circumstances, we conclude the rights of the parties with respect to this controversy over revocation of appellants' use permit to conduct business on the property have been finally determined, and neither affirmance nor reversal of the trial court's injunctive order can undue that determination at this point. (See *People v. Silva* (1981) 114 Cal.App.3d 538, 551 ["It is settled that a determination as to the validity of a former adjudication is res judicata in a subsequent proceeding attacking it."]. See also

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[3] At oral argument, appellants represented that their constitutional arguments remained "live issues" and were the subject of a cross-complaint filed against the City in this action. We, however, reviewed the record and found no such cross-complaint. Moreover, appellants' memorandum of points and authorities in opposition to the City's motion for preliminary injunction stated that "U-Haul has alleged serious violations of its constitutional rights in [a] previously-filed federal action." U-Haul's previously-filed federal action, like its prior state court action that ended with our March 2009 decision, involved the same parties and the same alleged harm to appellants from the City's revocation of its use permit. This, we believe, further establishes that principles of res judicata bar appellants from raising in this lawsuit issues that were or could have been raised in the earlier lawsuit. (See *Eichman v. Fotomat Corp*. (1983) 147 Cal.App.3d 1170, 1174-1175 ["If the same primary right is involved in two actions, judgment in the first bars consideration not only of all matters actually raised in the first suit but also all matters which could have been raised"].)

Littoral Development Co. v. San Francisco Bay Conservation Etc. Com. (1995) 33 Cal.App.4th 211, 217.) We thus conclude this appeal is moot and must be dismissed.

In reaching this conclusion, we acknowledge that exceptions to the mootness doctrine exist in cases involving issues of significant public interest that are likely to recur. (*Burch v. George* (1994) 7 Cal.4th 246, 253, fn. 4.) However, this does not appear to be one of those cases. Appellants have identified no issue of public interest implicated by this appeal, nor have they pointed us to any new evidence or circumstance that could perhaps justify revisiting our prior decision. (See *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541 ["the general rule governing mootness becomes subject to the case-recognized qualification that an appeal will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court's determination"].)[4]

Accordingly, for the reasons stated, this appeal is dismissed as moot.

DISPOSITION

The appeal is dismissed.

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Jenkins, J.

We concur:

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Pollak, J.

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McGuiness, P.J.

[4] We reject appellants' suggestion in supplemental briefing that we must decide this appeal because our March 2009 decision has not yet become final, as time remains for them to petition the United States Supreme Court for writ of certiorari. Rest assured, if this court is called upon by the United States Supreme Court to vacate or revisit any of our prior decisions determining the rights of appellants, we will do so.